(3)

88-226

Supreme Court, U.S.
FILED
SEP 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et.al.,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

MEMORANDUM OPPOSING CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES H. FOSBINDER,
Attorney for Respondent,
7739 E Broadway #181,
Tucson, AZ 85710.
(602)721-2468

JULIE FOSBINDER,
of counsel.

September 6, 1988

15

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et.al.,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

MEMORANDUM OPPOSING CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES H. FOSBINDER,
Attorney for Respondent,
7739 E Broadway #181,
Tucson, AZ 85710.
(602)721-2468

JULIE FOSBINDER,
of counsel.

September 6, 1988

TABLE OF AUTHORITIES

Cases	Page
Cinevision Corp v. City of Burbank, 745 F.2d 568.....	9
Grayned v. City of Rockford, 408 U.S. 104 (1972).....	2
Jim Crockett Promotion Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983).....	3
Kovacs v. Cooper, 336 U.S. 77 (1949).....	2
Legi-Tech Services, Inc. v. Kieper, 766 F.2d 728 (2nd Cir. 1985).....	5
Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980).....	2,3,6
Rock Against Racism v. Ward, 658 F. Supp. 1353 (S.D.N.Y. 1987).....	9

Shelton v. Tucker,
364 U.S. 479 (1960)..... 3
United States v. O'Brien, 391 U.S.
367 (1968)..... 5
United States v. Albertini, 472 U.S.
675 (1985)..... 5

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HON. BENJAMIN WARD, in his official capacity as Police Commissioner for the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks; and SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks, Petitioner,	)
v.	)
ROCK AGAINST RACISM, an unincorporated association, Respondent.	)

MEMORANDUM OPPOSING CERTIORARI

Petitioner argues that this Court should grant Certiorari based on three claims: 1) That a conflict of authority exists amongst the Circuit Courts with regard to the standards limiting

regard to the standards limiting regulation of speech, 2) that the Second Circuit applied the wrong standard in allegedly applying the "least restrictive means" test, and 3) that disastrous consequences will be inflicted upon the people of the City of New York if the Appeals Court decision is not reversed.

Respondent submits that each of these claims is false.

There is no disagreement between the circuits that governmental bodies have the power to regulate sound levels, nor is there disagreement that the proper standard to apply to such issues is whether an ordinance regulating speech is narrowly tailored.

> Noise levels may be regulated. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949); cf. Reeves v. McConn, 631 F.2d 377, 386-87 (5th Cir. 1980) (holding

that City may establish maximum wattage limits for amplified sound, but declaring ordinance unconstitutional where city failed to justify 20-watt limit), reh'g denied, 638 F.2d 762 (1981). That City could lawfully accomplish this purpose by establishing and enforcing reasonable limits on the volume, or noise level, emanating from the bandshell. See, e.g., Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486, 493 (4th Cir. 1983) (upholding ordinance limiting decibel levels as measured by standard metering techniques). (Court of Appeals Decision) (S. Ct. 13-14)[1]

The reasonableness of the regulation will be viewed "in light of less drastic means for achieving the same basic purpose". Shelton v. Tucker, 364 U.S. 479, 488; 81 S.Ct. 247, 252; 5 L.Ed.2d 231 (1960). Reeves v. McConn, supra, 631 F.2d at 386. The "narrowly tailored"

---

[1]All references in parenthesis are to either Petitioner's Appendix filed with the United States Supreme Court (S. Ct.) or to Appellant's Appendix filed with the Second Circuit (App. Ct.).

standard is specific and designed to be applied to the unique facts of each case, making "further elucidation" unnecessary.

Petitioner claims that the Second Circuit in this case did not apply this standard, but rather a "least restrictive means" test. Thorough reading of the decision shows that the Appeals Court did not strike down this regulation because it imagined some slightly less restrictive means, but rather because trial evidence showed numerous vastly less intrusive alternatives existed to accomplish the legitimate regulation of noise. (App. Ct. 920-925, 936-937). While a regulation that is not the very least intrusive imaginable may well be constitutional, one as outrageously intrusive, as the one in question, is clearly not. It was only in

expanding upon the universally accepted "narrowly tailored" guideline that the Court of Appeals stated:

> However, the method and extent of such a [narrowly tailored] regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation. United States v. O'Brien, 391 U.S. 367, 377 (1968); Legi-Tech Services v. Keiper, 766 F.2d 728, 735 (2d Cir. 1985). See United States vv. Albertini, 472 U.S. 675, 688-89 (1985) ("an incidental burden on speech is not greater than essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.") (S. Ct. 12)

Respondent submits that the guideline violates first amendment rights, regardless of the test applied, because a host of dramatically less intrusive methods exist to regulate sound levels in Central Park. Forcing demonstrators to

use any sound system and any sound operator chosen by City officials rather than one of their own choosing is surely a most intrusive means of achieving the basic purpose of the proposed regulation, to limit noise. As Judge Dorsey suggests, "(T)he City could impose a reasonable limit on the maximum power of the amplification equipment to be used," (S. Ct. 14) Reeves, 631 F.2d 386-87, rather than forcing the use of, and payment for, a system other than the demonstrator's own. While accurate sound measurement and control in the field was cumbersome a decade or more ago, changing technology has made it easy to accurately monitor noise levels.

> It was a very cumbersome way of controlling the noise levels at the Schaffer concert. But we were able to do it. The techniques are available today, it's much simpler to monitor these levels. (City's

sound expert Schulman.) (App.Ct. 936-937)

As such there is no basis to petitioner's plea that there will be disastrous consequences if the Second Circuit's decision is upheld, namely that they would be forced to "pull the plug", resulting in "substantial risk to public safety and park property." (S. Ct. 24-25) In reality, the "pulling the plug" suggestion was a mere footnote to the substantial list of existing alternatives, highlighting the absurdity of petitioner's idea that there are no viable alternatives to forcing use of the City's sound system and technician. The decision of the Second Circuit implicitly recognizes that the regulation of "noise" produced by political speech may not be stricter, more vague or more intrusive

than the regulation of noise produced by traffic, construction or industry. The City of New York is a self-proclaimed expert in sound technology, successfully and scientifically regulating varied noise level problems such as construction, traffic and ventilation systems. The only noise controlled in a subjective manner is noise protected by the first amendment. This turns the first amendment on its head. To maintain its argument of content-neutrality, then, the City must utilize those same resources in regulating sound levels in Central Park. Because these resources exist, petitioner has no reasonable claim of disastrous consequences resulting form the Second Circuit's decision.

In this case, the disagreement between the District Court and the Appeals Court

was not primarily in the interpretation of the law, but rather over the relative importance of the facts. The Appeals Court decided that the evidence presented showed that City control of the sound system did impinge upon performer's first amendment expression. In discussing this issue, Judge Dorsey writes:

> The district court considered RAR's first amendment interest in using its own sound system and engineer to be attenuated or nonexistent. Rock Against Racism, 658 F. Supp. at 1353. However, RAR and other sponsors clearly have a protected interest in directly controlling the sound mix and the choice of the system as an essential element of the artistic presentation. See Cinevision Corp., 745 F.2d at 568-69 (discussing role of concert promoters as protected by first amendment). (S. Ct. 15)
>
> ....
>
> Thus, the City must demonstrate that its regulation of the volume is reasonably accomplished by the required use of the city's system and the city's operator and that the requirements do not unnecessarily intrude on the right

> of artistic expression. (S. Ct. 16)
>
> ...
>
> The sound system and its operation are not questioned as an element of the artistic performance and thus are protected as a means of artistic expression. (S. Ct. 20)

IN CONCLUSION, the holding of the Court of Appeals is appropriate and consistent with first amendment law. Furthermore, its reversal of the District Court's decision is based primarily on a reevaluation of the significance of certain facts, rather than on substantive disagreement over the application or interpretation of existing law.

THEREFORE, the petition for a writ of certiorari should be denied.

Respondent further requests leave to file a complete response brief to the petition, should the Court wish to see one.

Respectfully submitted,

JAMES H. FOSBINDER
Attorney for Respondent
7739 E. Broadway #181
Tucson, AZ 85710
(602)721-2468

JULIE FOSBINDER,
of counsel.

Dated: September 6, 1988